in CC Docket No. 91-213[40] implicates only the FCC's pricing rules for transport, not the underlying rate structure.

N. The FCC Should Establish A Strict Policy Of Nondiscrimination Under Section 251(c)

[NPRM, paras. 61, 87-91.] The FCC asks whether it should establish uniform national guidelines and standards to implement the nondiscrimination principle in connection with Section 251(c). The FCC should establish a national policy, expressly under Section 251 and in addition to the requirements of Section 202(a), that ILECs undertake installation, maintenance, repair, provisioning, billing, service ordering, and related functions on a nondiscriminatory basis among all requesting carriers, including their own affiliates, as well as compared to similar functions provided by the ILECs for monopoly and competitive services outside of Section 251(c). This policy should apply, at a minimum, to interconnection under Section 251(c)(2), unbundled network elements under Section 251(c)(3), and wholesale local exchange services under Section 251(c)(4). Further, the FCC should establish the policy that ILECs must not discriminate between the quality of the network elements they provide to requesting carriers, and the quality of such elements

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[40] Transport Rate Structure and Pricing, 10 FCC Rcd 3030 (1994), appeal pending, Competitive Telecommunications Ass'n v. FCC, Nos. 95-1168 & 1170 (D.C. Cir.).

or the equivalent functions that they provide to themselves or their own affiliates. **[NPRM, para. 87.]**

The FCC has found many times that the ILECs continue to possess monopoly power in the local market.[41] As a result, ILECs have the incentive and ability to subvert Section 251(c) by engaging in dilatory, negligent, obstructionist and other discriminatory activities. The FCC should establish a clear national policy requiring the ILECs to provide the functions and services necessary to implement Section 251(c) on a nondiscriminatory basis. By establishing this policy under Section 251(c), the FCC will make clear that the Bell Companies must comply in full before they can enter the interLATA market in their own regions. In order to compile the necessary data to monitor compliance with this policy, the FCC should order the ILECs to file publicly-available reports on a quarterly basis providing statistics by period and in the aggregate on these matters.

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[41] E.g., Ameritech Operating Companies Petition for A Declaratory Ruling and Related Waivers To Establish A New Regulatory Model For The Ameritech Region, FCC 96-58, rel. Feb. 15, 1996, at para. 66 ("[b]ecause of . . . regulatory, technical and economic factors, LECs in most parts of the country continue to exercise market power in the provision of both intrastate local exchange service and the local switching and common line components of interstate switched access service"). The FCC continues to regulate ILECs as dominant carriers. E.g., End User Common Line Charges, 10 FCC Rcd 8565, 8580 (1995).

III. THE FCC SHOULD NOT INJECT SERVICE OR CARRIER RESTRICTIONS INTO SECTION 251(C) WHICH CONGRESS DID NOT EXPRESSLY DECREE

[NPRM, paras. 42-45, 49-55, 158-165.] Section 251(c) is the cornerstone of the 1996 Act. As the gateway to the ILECs' bottleneck local networks, Section 251(c) entitles every carrier to select among a diverse range of options for accessing or using those networks on a co-carrier basis, not as a customer of the ILEC. Those options include interconnection under Section 251(c)(2), unbundled network elements under Section 251(c)(3), and wholesale local exchange service under Section 251(c)(4). The FCC should not write into this core provision any restrictions upon the carriers who may enter into co-carrier arrangements with ILECs, or the types of traffic they may route pursuant to such arrangements, except as Congress has decreed expressly. It would subvert Congress' intention to establish efficient competition in all market segments were the FCC to restrict any carrier's right to enter into a co-carrier arrangement with an ILEC to compete more effectively in any market segment.[42]

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[42] This result would be contrary to the intent of Congress to "decompartmentalize segments of the telecommunications industry." See 142 Cong. Rec. H1149 (Feb. 11, 1996) (Statement of Representative Fields).

A. Section 251(c)(2) Enables Telecommunications Carriers To Obtain Exchange Access From ILECs Through Co-Carrier Interconnection Arrangements

[NPRM, paras. 159-165.] Section 251(c)(2) permits any "telecommunications carrier" to obtain interconnection from an ILEC on a co-carrier basis for the "transmission and routing of telephone exchange service and exchange access."[43] This language enables every telecommunications carrier to enter into a nondiscriminatory interconnection arrangement with an ILEC on a co-carrier basis for the transmission and routing of traffic qualifying as telephone exchange service or exchange access.

The FCC is correct that the term "telecommunications carrier," according to its definition, includes carriers providing long distance service. However, there is no support in the statutory language for the FCC's tentative conclusion that Section 251(c)(2) permits a carrier to obtain exchange access only to "offer[]" exchange access service to others. **[NPRM, para. 161.]** The FCC derives that interpretation from the definition of "exchange access" as the "offering" of exchange access for originating or terminating toll traffic. While we support the FCC's evident intent to interpret the statute according to its plain language, the FCC is misreading the interplay between the definition of "exchange access" and Section 251(c)(2). Section 251(c)(2) does not state or imply that the

[43] 47 U.S.C. § 251(c)(2).

requesting carrier must offer exchange access to others. Rather, it requires the ILEC to "offer[]" exchange access, as every ILEC does today. That is the most sensible reading of Section 251(c) since it is the ILEC's local exchange network over which exchange access is being offered and provided.[44] The transmission and routing of exchange access pursuant to a co-carrier arrangement with an ILEC inherently involves an "offering" of exchange access.[45]

If Congress intended to require the requesting carrier to offer exchange access service, it would not have written the provision broadly to apply to "any requesting telecommunications carrier." Rather, Congress would have used the narrower term "local exchange carrier." Any carrier who offers exchange access qualifies as a local exchange carrier, and the FCC's proposed interpretation of this provision would effectively substitute the term "local exchange carrier" for the broader term

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[44] Indeed, if the FCC is correct to conclude that long distance carriers are "receiving" exchange access from the ILECs, that implies that the ILECs are "offering" it to requesting carriers. **[NPRM, para. 161.]**

[45] Section 251(a) in S. 652 contained language requiring the requesting carrier to obtain interconnection "for the purpose of providing telephone exchange or exchange access service." See Joint Explanatory Statement. That provision did not become law as written; Congress changed the language in question during conference committee to remove the requirement that requesting carriers obtain interconnection for the purpose of providing telephone exchange or exchange access service. There is no legislative history indicating that Congress intended to preserve that requirement despite removing it from the 1996 Act.

"telecommunications carrier" used by Congress.[46] Congress did not intend to limit eligibility for interconnection arrangements under Section 251(c)(2) to any class of carriers narrower than all "telecommunications carriers."

Our interpretation is consistent with the most natural reading of the phrase in Section 251(c)(2)(A) regarding "the transmission and routing of telephone exchange service and exchange access." The sentence does not work well if one replaces the term "exchange access" with, as the FCC suggests might be done, "exchange access offering." Carriers do not transmit or route offerings; they transmit and route traffic. Congress did not intend to alter the natural meaning of that phrase -- and sharply limit eligibility for co-carrier interconnection arrangements -- by including the word "offering" in the definition of the term "exchange access."

Moreover, the FCC wrongly assumes that long distance carriers do not "offer" exchange access to their subscribers. The rates paid by long distance customers include their carriers' costs of obtaining exchange access. A carrier's pricing decision to bundle exchange access into a single end-to-end long distance rate does not change the fact that the carrier is providing originating and terminating exchange access to its customers.

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[46] Congress carefully constructed three categories of carriers -- telecommunications carriers, LECs and ILECs -- and the Commission should strive to interpret the legislation to avoid blurring the distinction among those terms whenever possible.

Hence, it qualifies under the definition of "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." It may be true, as the FCC notes, that a long distance provider is "receiving" exchange access from the ILEC, but it also is "offering" exchange access to its own subscribers as an integral part of long distance service. Therefore, the FCC should interpret Section 251(c)(2) to enable all carriers to obtain stand-alone exchange access for their own long distance services through co-carrier interconnection arrangements with ILECs.

B. Interpreting Section 251(c)(2) to Prohibit Carriers From Obtaining Exchange Access For Their Own Long Distance Services Is Impractical and Unsustainable

[NPRM, paras. 159-165.] Any attempt by the FCC to preclude particular carriers from interconnecting with ILECs under Section 251(c)(2) will fail. The premise underlying the FCC's conclusion is that a definable carrier segment -- "interexchange carriers" -- will continue to be recognizable. That premise runs counter to Congress' expectation that markets can and will converge. Moreover, the FCC's tentative interpretation would simply force carriers to develop unnecessary business structures or incur wasted costs in order to comply with a hypertechnical construction of the term "offering" in the definition of "exchange access." Congress did not intend for the industry to waste enormous resources in proving the ultimate futility of attempting to erect entry barriers around Section

251(c)(2) to keep "interexchange carriers" from obtaining co-carrier interconnection arrangements at cost-based rates.

Initially, should the FCC seek to construe Section 251(c)(2) to preclude carriers from obtaining stand-alone exchange access, the FCC would have to address whether a requesting carrier could use Section 251(c)(2) to supply exchange access for its own long distance services if it also offered exchange access to third parties. If the answer is yes, then many carriers will be able to obtain exchange access for their own long distance services merely by establishing an exchange access offering.

It would be even less tenable for the FCC to conclude that no carrier can obtain interconnection under Section 251(c)(2) to obtain exchange access for its own long distance services. In response, a carrier could establish a partially- or wholly-owned affiliate who would enter into co-carrier interconnection agreements with ILECs for purposes of "offering" exchange access to that carrier. Or carriers could establish affiliates who would offer exchange access to each other's affiliated carriers (i.e., Carrier X would establish an affiliate to offer exchange access to Carrier Y, who would establish an affiliate to offer exchange access to Carrier X). Several carriers might jointly establish a separate entity for purposes of offering exchange access from ILECs pursuant to co-carrier interconnection arrangements.[47] Or new entrants lacking any affiliation with existing carriers could enter the market solely to obtain exchange access from an ILEC pursuant to Section 251(c)(2) and then resell or rebill such access to long distance carriers. The reality is that carriers who offer long distance service will develop one or more lawful ways to obtain exchange access through co-carrier arrangements with ILECs under Section 251(c)(2).

Interpreting Section 251(c)(2) to preclude carriers from obtaining exchange access for their own long distance services would have no beneficial results. It would lead to expensive, time-consuming and pointless litigation between ILECs and other carriers over who should be able to obtain exchange access pursuant to co-carrier interconnection arrangements and under what conditions. Carriers would ultimately succeed in using Section 251(c)(2) to obtain exchange access for their own services only after incurring needless costs to establish new entities or other market mechanisms to comply with the "offering" requirement. The FCC and courts would be faced with the complex task of defining the term "offering" and determining the types and nature of entities who may obtain exchange access from ILECs under Section 251(c)(2) for purposes of offering such access to

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[47] It is reported that several Bell Companies are seeking to purchase transmission capacity jointly for in-region long distance services. "BellSouth, Pacific Bell and SBC Considering Joint Long Distance Buying," Communications Daily, May 3, 1996, at p. 1.

other carriers. Only the ILECs would benefit from the FCC's proposed interpretation through delayed exchange access competition and the imposition of burdensome new costs upon other carriers.

Only if the FCC attempted to write exchange access completely out of Section 251(c)(2) would it be possible in theory to prevent "interexchange carriers" from obtaining exchange access through co-carrier interconnection agreements. However, that attempt would be successful in practice only if the FCC were to limit Section 251(c)(2) to "local" services and requires every "local" carrier to adhere to the same local calling area. Imposing a government-mandated local calling area upon the industry would be the antithesis of competition, and it would defeat Congress' desire for carriers and consumers to benefit from the competition following new entry into the marketplace. Congress did not intend for the FCC to repress competitive outcomes in an effort to restrict "interexchange carriers" from entering into co-carrier interconnection agreements as they are entitled to do under the plain language of Section 251(c)(2).

Congress wrote the 1996 Act to foreclose such results. Congress did not intend to establish arbitrary restrictions upon any carrier's ability to obtain co-carrier interconnection arrangements from ILECs under Section 251(c)(2). Congress did not intend to force carriers to establish new but otherwise unnecessary business structures for the formalistic purpose of complying with eligibility requirements for exchange access "offerings." Congress did not intend to spawn massive litigation between ILECs and other carriers over eligibility under Section 251(c)(2) which the FCC and courts would have to resolve on a case-by-case basis through the establishment and administration of new and potentially complex regulatory regimes. The FCC should side-step that quagmire by interpreting Section 251(c)(2) according to its terms, to permit carriers to obtain exchange access for their own long distance services pursuant to co-carrier interconnection arrangements with ILECs.

C. Section 251(i) Does Not Affect The Proper Interpretation of Section 251(c)(2)

[NPRM, para. 161.] The FCC suggests that its proposed interpretation is consistent with Section 251(i), which preserves the FCC's authority under Section 201. However, Sections 251(i) and 201 bear no relevance to the proper interpretation of Section 251(c)(2). The FCC established its carrier-to-customer access charge regime under Part 69 pursuant to its statutory authority under Section 201. Congress did not intend for the 1996 Act to supersede that access charge regime, and carriers continue to obtain exchange access pursuant to the ILECs' access tariffs today.[48] Even after carriers begin to obtain exchange access

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[48] The FCC's access charge regime is expressly preserved by Section 261(a), which states that the FCC may enforce pre-existing regulations so long as they are not inconsistent with the 1996 Act. Several parties believe that Section 251(g) preserves the access charge regime under Part 69.
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through co-carrier interconnection arrangements with ILECs under Section 251(c)(2), they will continue to have the option of purchasing exchange access as customers of the ILECs under the access charge regime.

The proper interpretation of Section 251(c)(2) would conflict with the FCC's authority under Section 201 only if long distance carriers are required to obtain exchange access pursuant to the ILECs' access tariffs. But there has never been any such requirement. As the FCC correctly notes, long distance carriers are "entitled" to obtain exchange access from the ILECs through their access tariffs. **[NPRM, para. 161.]** They are not now, and never have been, required to do so.[49] They have the legal option of providing their own exchange access, or purchasing exchange access from competitive access providers and other new entrants in the local market to the extent such alternatives are available. The ILECs' carrier-to-customer access tariffs are merely one of these legal options (granted, the predominant one

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CompTel disagrees. Congress adopted Section 251(g) to preserve the equal access and interconnection regulations in the AT&T consent decree and other agency regulations. The access charge regime under Part 69 is broader than "equal access and interconnection," as it applies, for example, to Special Access and other services.

49 Once again, the ILECs confuse their own requirements with those of long distance carriers. ILECs are required to offer exchange access pursuant to Part 69 and their carrier-to-customer access tariffs; long distance carriers are permitted but not required to obtain exchange access from ILECs through such tariffs.

today due to the ILECs' market power) for carriers to obtain exchange access for their long distance services. Section 251(c)(2) now provides that carriers can obtain exchange access through co-carrier interconnection arrangements with ILECs. The continued existence of the ILECs' carrier-to-customer access charge regime, and the FCC's authority over that regime under Section 201, are unaffected by Section 251(c)(2).[50]

We fully expect that carriers will prefer to obtain exchange access through co-carrier arrangements pursuant to Section 251(c)(2) rather than as ILEC customers purchasing service out of access charge tariffs.[51] That is not a justification for injecting restrictions into Section 251(c)(2) that Congress did not put there, but a compelling reason to reform the access charge system at once by establishing rates based on economic costs. The FCC has stated time and again that

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50 Although the 1996 Act does not supersede the access charge regime, above-cost access rates are inconsistent with the 1996 Act and, therefore, must be reformed by the FCC under Section 261(a). The FCC itself has questioned whether above-cost access rates are sustainable as the industry moves to implement co-carrier cost-based arrangements. **[NPRM, para. 146.]** There may be no need to resolve this question if the FCC moves quickly, as it has promised, to complete access charge reform.

51 There is an industry consensus that access rates are substantially above economic costs. E.g., "The Cost of Basic Network Elements: Theory, Modeling and Policy Implications," Hatfield Associates, Inc., March, 1996 at i (access rates approximately seven times higher than economic costs).

it plans to reform access charges,[52] and in the NPRM it expressly reaffirmed its "intention of taking up access charge reform in the very near future." **[NPRM, paras. 146, 165.]** To the extent the FCC is worried about the potential impact of traffic migration from access charge tariffs to co-carrier arrangements under Section 251(c), the FCC should devise an interim plan for the industry.[53] In no event should the FCC let the need for access charge reform influence its interpretation of the exchange access provisions in Section 251(c)(2).

The adoption of a co-carrier regime by Congress does not entail that the FCC eliminate or phase out the carrier-to-customer access charge regime. Even as long distance carriers become less dependent upon that regime by migrating traffic to co-carrier arrangements with ILECs, it remains an important resource for end-user customers. End users do not qualify as "telecommunications carriers" under the 1996 Act, and therefore do not qualify for co-carrier arrangements, but they may desire to continue purchasing access and related services as customers

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[52] E.g., Speech of FCC Chairman Reed Hundt, Northwestern University, Chicago, Illinois, "The Telecommunications Act of 1996: Evolution Not Revolution," May 10, 1996 (recognizing pressing need for access charge reform); Common Carrier Bureau's Tariff Division Becomes the Competitive Pricing Division, 1996 WL 203144, Report No. CC 96-12 (April 26, 1996)(recognizing responsibility of Competitive Pricing Division to implement access charge reform).

[53] For a description of the interim plan which CompTel proposes regarding stand-alone exchange access, see Section V., infra.

of the ILECs under intrastate and interstate access charge tariffs. For both carrier-customers and end-user customers alike, Section 251(i) preserves the FCC's full authority over the traditional carrier-to-customer access charge regime under Section 201 of the Communications Act.

D. The FCC Should Adopt The Fundamental Principle That All Carriers Purchasing The Same Facility Or Service From the Same ILEC Should Pay The Same Rate

[NPRM, paras. 159-165.] The FCC's proposed interpretation of Section 251(c)(2) would mean that certain carriers could obtain exchange access from an ILEC at one price under Section 251(c)(2), while other carriers obtaining the same exchange access from the same ILEC would have to pay a different (presumably higher) rate under the access charge system. That approach is economically inefficient and it would arbitrarily distort competition and investment in the telecommunications market. That result is what Congress desired to avoid when it created a new co-carrier model giving all "telecommunications carriers" multiple options for purchasing or interconnecting with the ILEC's bottleneck local network on a co-carrier basis. It is imperative that the FCC adopt and apply the fundamental principle that, subject to cost-based deviations, all carriers should pay the same rate when they purchase the same facility or service from the same ILEC.[54]

It is not possible to develop meaningful distinctions between types of carriers as a rational basis for requiring different carriers to pay different rates for the same facility or service from an ILEC. There is a consensus in the industry that most carriers, and all of the largest carriers, are moving as fast as possible to become full-service providers. These carriers may not start from the same position in the industry -- as LECs move to become interLATA providers, and long distance carriers seek to enter the local market -- but they are all heading towards the same place. Terms like "toll" and "local" are moribund; those terms reflect how carriers have priced retail services in the past and they will be stretched beyond meaning as carriers and customers experiment with new calling areas and pricing plans.[55] As distinctions between types of carriers and

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[54] This principle is a necessary corollary of the statutory mandate that rates for interconnection under Section 251(c)(2) and unbundled network elements under Section 251(c)(3) be priced at the ILEC's economic costs. <u>See</u> Section V., <u>infra</u>. Both of these sections also mandate that the rates for interconnection and unbundled network elements be "nondiscriminatory". TSLRIC pricing will ensure that all carriers pay nondiscriminatory rates when they obtain facilities and services from ILECs.

[55] <u>E.g.,</u> Direct Testimony of Robert C. Scheye, BellSouth Telecommunications, Inc., Before the Kentucky Public Service Commission, Administrative Case No. 355, April 1996, at 4 & 10 ("it is imperative that the plan adopted for local interconnection accommodate the evolution of local and toll to the point where no distinctions are possible").

traffic lose all validity in the marketplace, the FCC should strive not to incorporate such distinctions into its interpretation of the 1996 Act and the rules it adopts implementing Section 251. When most carriers are competing against each other as full-service providers, pricing distinctions based upon outmoded categories of carriers and traffic will serve only to impose economically inefficient handicaps upon certain carriers, while bestowing unearned and uneconomic cost advantages upon other carriers, in derogation of Congress' pro-competitive objectives and to the ultimate detriment of consumers.

E. The Statutory Reference to "Telephone Exchange Service and Exchange Access" Does Not Mean That Reqesting Carriers Must Provide Both or Neither

[NPRM, para. 162.] The FCC has asked whether Section 251(c)(2) permits an ILEC to refuse to provide a co-carrier interconnection arrangement unless the requesting carrier seeks to route both telephone exchange and exchange access traffic over the ILEC's network. The ILECs have proffered that view based on the statutory reference to the "transmission and routing of telephone exchange service and exchange access." That view is incorrect. The proper interpretation of Section 251(c)(2) is that ILECs must offer co-carrier interconnection arrangements for both telephone exchange service and exchange access, but that a requesting carrier can obtain interconnection for telephone exchange service only, for exchange access only, or for both, at its option.

Consider the following hypothetical. Suppose Congress adopted a law requiring ILECs to provide ten different services to subscribers, and suppose that a customer wanted to subscribe to only one of the ten services. Would an ILEC be entitled to refuse to provide that service unless the customer subscribed to the other nine services that it does not want or need? The only sensible construction of such a provision is that the "and" should be read literally as regards an ILEC's obligation to offer service, but it should be construed as "or" with respect to a customer's ability to subscribe to service. That Section 251(c)(2) involves two options rather than ten, and co-carrier arrangements rather than customer relationships, does not entail a different result.

It is well-established that the word "and" in legislation can be read alternatively as "and" or "or" depending upon the context and Congress' intention.[56] That is particularly true here, where use of either word would lead to an incorrect interpretation if read in a strict grammatical sense rather than

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[56] E.g., Bruce v. First Federal Savings and Loan Ass'n of Conroe, Inc., 837 F.2d 712, 715 (5th Cir. 1988); Peacock v. Lubbock Compress Co., 252 F.2d 892-893-95 (5th Cir. 1958). In United States v. Fisk, 70 U.S. 445, 447 (1865) the Supreme Court noted that "to ascertain the clear intention of the legislature . . . courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'" See generally 1A N. Singer, Sutherland on Statutes and Statutory Construction § 21.14 (5th ed. 1993).

naturally. For example, had Congress used "or" instead of "and," the ILECs undoubtedly would argue that requesting carriers could interconnect for telephone exchange or exchange access, but not both. It bears emphasis that Congress defined a "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service <u>or</u> exchange access." By defining "local exchange carrier" to include a carrier who provides exchange access only, Congress plainly did not intend to require the broader category of "telecommunications carriers" to provide both exchange and exchange access in order to enter into co-carrier interconnection arrangements under Section 251(c)(2).

F. Carriers Are Entitled To Obtain Exchange Access For Their Own Long Distance Services Through Co-Carrier Arrangements Under Section 251(c)(3)

[NPRM, paras. 83-85 & 164-165.] Section 251(c)(3) requires ILECs to provide "any requesting telecommunications carrier" with access to unbundled network elements at any "technically feasible point" for the provision of any "telecommunications service" at rates, terms and conditions that are just, reasonable and nondiscriminatory. Network elements include not only the "facility or equipment" used to provide a telecommunications service," but the "features, functions, and capabilities" that are provided by means of such facilities and equipment. On its face, this provision authorizes carriers to purchase the features and functions which comprise exchange access. Purchasing these "features" and "functions" as network elements under Section 251(c)(3) is distinct from historical exchange access services in that they will be purchased from the ILECs on an unbundled, unseparated basis pursuant to co-carrier arrangements.

By its language, Section 251(c)(3) permits carriers to purchase "features" and "functions" for the purpose of obtaining exchange access for their own long distance services. The 1996 Act makes clear, and the FCC agrees, that long distance service is a "telecommunications service" within the meaning of Section 253(c)(3). **[NPRM, paras. 159 & 163.]** Therefore, carriers are entitled to enter into co-carrier arrangements with ILECs to obtain the features and functions comprising exchange access for the provision of their own long distance services.[57] The FCC also should clarify that a requesting carrier who purchases features and/or functions on an unbundled basis should not pay more in the aggregate than a carrier who chooses to purchase the same features and/or functions in the aggregate from the ILEC.[58]

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[57] For the reasons stated above, Sections 251(i) and 201 of the Act do not affect the proper interpretation of Section 251(c)(3) any more than they affect the proper interpretation of Section 251(c)(2). <u>See</u> Section III.C., <u>supra</u>.

[58] Carriers also may obtain exchange access by purchasing unbundled network facilities from an ILEC. Once a carrier has purchased the facilities for providing service to an end-user subscriber, the carrier should be able to provide any and all services to that subscriber over those facilities, including originating and terminating exchange access. <u>See</u> Section III.A., <u>supra</u>.

G. Section 252(i) Confirms That Congress Intended For All Carriers to Obtain Exchange Access for Their Own Long Distance Services Through Co-Carrier Arrangements Under Section 251(c)

Section 252(i) removes any doubt that Congress intended for carriers to enter into co-carrier arrangements under Sections 251(c)(2) and (c)(3) to obtain exchange access on a stand-alone basis for their long distance services. Section 252(i) requires each LEC to make available any interconnection service or network element "to any other requesting telecommunications carrier upon the same terms and conditions." This provision confirms that Congress sought to ensure that all telecommunications carriers, not just local exchange carriers, are entitled to enter into co-carrier arrangements pursuant to Sections 251(c)(2) and (c)(3). Congress wrote this provision to ensure that Section 251(c) applies broadly in a nondiscriminatory fashion, and it deliberately chose the term "telecommunications carrier" rather than the narrower term "local exchange carrier." It would impermissibly re-write Section 252(i) for the FCC to limit the range of carriers who may obtain exchange access pursuant to co-carrier arrangements under Section 251(c).

H. Section 251(c)(2) Does Not Apply To The Mere "Physical Linking" of Facilities

[NPRM, paras. 53-54.] The FCC asked whether Section 251(c)(2) applies only to the "facilities and equipment physically linking two networks and not to transport and termination services provided by such linking." The language of this section permits no such interpretation. The stated purpose of interconnection is "the transmission and routing of telephone exchange service and exchange access." It would make no sense for Congress to require an ILEC to engage in a "physical linking" with another network without also requiring the ILEC to route and terminate traffic from the other network. The technical aspects of interconnection are not an end in themselves; they are merely a means by which carriers route traffic over each other's networks. Congress used the term "interconnection" in a broad generic sense, not in a narrow technical sense -- Section 251 in its entirety is entitled simply as "Interconnection." Therefore, the FCC should interpret Section 251(c)(2) to apply to the transport and termination of traffic exchanged with an ILEC pursuant to a co-carrier interconnection agreement.

IV. THE FCC SHOULD ADOPT TSLRIC AS A MANDATORY NATIONAL COSTING STANDARD TO IMPLEMENT THE REQUIREMENT FOR RATES BASED ON ECONOMIC COSTS UNDER SECTIONS 251(C) AND 252(D)

[NPRM, paras. 117-157.] The FCC has a once-in-a-generation opportunity to ensure that the telephone network is priced in an economically efficient manner. The FCC should seize this opportunity with both hands by adopting TSLRIC as the cost standard for interconnection under Section 251(c)(2) and unbundled network elements under Section 251(c)(3). The 1996 Act requires that rates be based on economic costs, and economists and regulators alike agree that Total Service Long Run Incremental Cost (or TSLRIC) is the best methodology for achieving truly cost-based rates. **[NPRM, paras. 124, 126.]** The FCC should not even start down the path of exploring "second-best" solutions to the pricing of interconnection and network elements. The 1996 Act requires rates based on economic costs, and the FCC is required to adopt TSLRIC-based pricing as the best approximation of economic costs available today.[59]

The ILECs will argue that additional "costs" or overheads should be loaded onto TSLRIC rates to ensure that TSLRIC pricing is revenue neutral. In fact, the ILECs' current revenues are not directly tied to their costs, historical or otherwise. Through price cap regulation, the ILECs have established rate levels and revenue streams that bear no logical or necessary relationship to their historical costs. The most that can be said is that the ILECs will not recover the same revenue stream through unseparated TSLRIC rates that they recover today through jurisdictionally-separated intrastate and interstate access charges. However, the 1996 Act precludes the FCC or state commissions from permitting the ILECs to load some or all of these excess revenues onto TSLRIC rates. Adopting "TSLRIC-plus" rates would merely re-formulate the current regime, which stifles competition, skews investment decisions, distorts network design, hides inefficiency and inflates telephone rates.

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59 Consistent with the position taken by the Telecommunications Carriers for Competition, CompTel supports using the Hatfield Model as the default TSLRIC methodology unless the ILECs or others develop demonstrably more accurate, publicly available TSLRIC methodologies.

The FCC must adopt TSLRIC as the cost standard mandated by Congress for Sections 251(c)(2) and (c)(3).

A. The 1996 Act Requires The FCC To Adopt TSLRIC For Interconnection and Unbundled Network Elements Under Section 251(c)

[NPRM, paras. 121-143.] The 1996 Act mandates rates for interconnection and unbundled network elements under Section 251(c) that are based on economic costs. Sections 251(c)(2) and (c)(3) require rates which are "just, reasonable, and nondiscriminatory." Section 252(d)(1) provides that the rates for interconnection and unbundled network elements under Section 251(c) "shall be . . . based on the cost . . . of providing the interconnection or network element." That section defines cost to exclude rate-of-return and rate-based approaches, and it permits cost to include a reasonable profit. No costing standard complies with this mandate except one which ensures that rates for interconnection and unbundled network elements are based on economic costs.

The FCC should adopt a uniform national rule mandating TSLRIC as the methodology for deriving rates for interconnection and unbundled network elements under Section 251(c).[60] TSLRIC measures all the forward-looking economic costs of providing

[60] With respect to unbundled network elements, the methodology known as TSLRIC measures the costs of the network facilities over which multiple services are routed. Hence, the term "service" in TSLRIC here is more properly read as a network element purchased under Section 251(c)(3).

interconnection or network elements based on the most efficient technology and network topology. TSLRIC shares risk among the ILECs and other carriers, and it reflects a reasonable profit by including the cost of capital. As a long-run methodology, the TSLRIC price of interconnection or network elements picks up many costs which otherwise might be regarded as joint or common costs in the context of a retail cost study.[61] Under TSLRIC, ILECs will be compensated fully for the economic costs of providing interconnection and unbundled network elements to requesting carriers under Section 251(c). TSLRIC is widely recognized and applied by state commissions, and the FCC has endorsed LRIC-based approaches in the past.[62] The FCC should adopt TSLRIC as the best available methodology for establishing rates that reflect economic costs.[63]

Any cost approach which requires or permits ILECs to derive rates based in whole or in part on the ILECs' excess

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61 For example, the costs associated with planning, engineering and operating an ILEC's network may be considered common or joint costs when deriving rates for retail services, but they are generally viewed as direct costs when deriving rates for network facilities or elements.

62 E.g., Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 95-185 & 94-54, FCC 96-1, rel. Feb. 16, 1996, at paras. 47-48 (Notice of Proposed Rulemaking).

63 Section 252(d)(2) requires charges for transport and termination to reflect "a reasonable approximation of the additional costs of terminating such calls." This further supports an interpretation of Sections 251(c) and 252(d) to mandate incremental costing for co-carrier interconnection and network element rates.